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Opinion following rehearing

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

LUIS C. HERNANDEZ,

Defendant and Appellant.

B287629

(Los Angeles County
Super. Ct. No. PA089118)

APPEAL from a judgment of the Superior Court of Los Angeles County, Hayden Zacky, Judge. Judgment of conviction affirmed, sentence vacated, and remanded for resentencing.

Lindsey M. Ball, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Scott A. Taryle and Rene Judkiewicz, Deputy Attorneys General, for Plaintiff and Respondent.

Luis C. Hernandez appeals from a judgment convicting him of carjacking and sentencing him to 33 years in prison. He contends his sentence should be vacated and the case remanded to allow the trial court to decide whether to strike a 10-year firearm enhancement under Penal Code section 12022.53 and a 5-year prior serious felony enhancement under section 667.¹

We conclude that the matter must be remanded to allow the trial court to decide whether to exercise its discretion to strike the prior serious felony enhancement and resentence Hernandez fully aware of its sentencing discretion. We therefore affirm the judgment of conviction, vacate the sentence, and remand for resentencing.

FACTUAL AND PROCEDURAL BACKGROUND

1. *The Carjacking*

On June 29, 2017, in the early afternoon, Jose Larin washed the outside of his car at a self-serve carwash and then parked in a nearby alley to clean the inside of the car. Larin was seated inside the car cleaning the dashboard when Hernandez approached on the driver's side, pointed a gun at Larin's head, and threatened to kill Larin if he did not get out of the car. Larin got out of the car. Hernandez then got in the car and drove away.

2. *The Information*

The district attorney filed an information followed by an amended information charging Hernandez with carjacking (§ 215, subd. (a)) and alleging that Hernandez personally used a firearm in the commission of the crime (§ 12022.53, subd. (b)). The information also alleged that Hernandez had suffered a prior

¹ All undesignated section references are to the Penal Code.

conviction of making a criminal threat (§ 422), constituting a strike under the Three Strikes law (§§ 667, subds. (b)-(j), 1170.12) and a serious felony (§ 667, subd. (a)), and had suffered four prior convictions, served prison terms for those offenses, and did not remain free from prison custody for a period of five years after the conclusion of each term (§ 667.5, subd. (b)).

3. *The Verdict and Sentencing*

A jury convicted Hernandez of carjacking and found that the firearm use allegation was true. Hernandez admitted the prior strike under the Three Strikes law and four prior prison terms under section 667.5, subdivision (b).

The trial court sentenced Hernandez on December 11, 2017. At that time, the court denied Hernandez's *Romero* motion to strike his prior strike (*People v. Romero* (1996) 13 Cal.4th 497). The court sentenced Hernandez to a total of 33 years in prison, consisting of the high term of nine years for carjacking, doubled to 18 years under the Three Strikes law, plus 10 years for the firearm enhancement (§ 12022.53, subd. (b)) and five years for the prior serious felony (§ 667, subd. (a)(1)). The court struck the four prior prison terms in the furtherance of justice, pursuant to section 1385.

4. *The Original Opinion and Rehearing*

On appeal, Hernandez contended his sentence should be vacated and the case remanded to allow the trial court to decide whether to strike the 10-year firearm enhancement under Penal Code section 12022.53, as amended effective January 1, 2018.²

² At the time of Hernandez's sentencing in December 2017, the trial court had no authority to strike a firearm enhancement under section 12022.53. (Stats. 2010, ch. 711, § 5.) As amended by Senate Bill No. 620 (2017-2018 Reg. Sess.), effective January

We concluded that the statutory amendment applied retroactively to this case, but held that the record clearly indicated that the trial court would not have stricken the 10-year enhancement if it had the discretion to do so at the time of sentencing. We therefore affirmed the judgment in its entirety.

Hernandez filed a petition for rehearing based on Senate Bill No. 1393 (2017-2018 Reg. Sess.), which as of January 1, 2019, gives the sentencing court the discretion to strike a prior serious felony enhancement under section 667. We granted a rehearing, vacating our decision (Cal. Rules of Court, rule 8.268(d)), and requested an answer to the petition.

DISCUSSION

At the time of Hernandez's sentencing in December 2017, the trial court had no authority to strike a prior serious felony enhancement under section 667. Former section 667, subdivision (a)(1) together with former section 1385, subdivision (b) precluded striking such an enhancement. As amended by Senate Bill No. 1393 (2017-2018 Reg. Sess.), effective January 1, 2019,³ sections 667 and 1385 now allow the sentencing court the discretion to strike a prior serious felony enhancement in furtherance of justice.⁴ (Stats. 2018, ch. 1013, §§ 1-2.)

1, 2018, section 12022.53, subdivision (h) now gives the sentencing court the discretion to strike a firearm enhancement in furtherance of justice pursuant to section 1385.

³ Statutes enacted at a regular session go into effect on January 1 of the following year. (Cal. Const., art. IV, § 8, subd. (c)(1).)

⁴ Senate Bill No. 1393 deleted language in former section 667, subdivision (a)(1) stating that a five-year enhancement for a

In re Estrada (1965) 63 Cal.2d 740 held that, absent evidence to the contrary, the court must presume the Legislature intended any statutory amendment mitigating punishment for a particular crime to apply retroactively to all defendants whose judgments were not yet final on the operative date of the amendment.⁵ (*Id.* at pp. 747-748; see *Brown, supra*, 54 Cal.4th at p. 324 [*Estrada* “articulat[ed] the reasonable presumption that a legislative act mitigating the punishment for a particular criminal offense is intended to apply to all nonfinal judgments”].) The *Estrada* rule applies not only to amendments reducing the penalty for a crime, but also to amendments giving the court discretion to impose a lesser penalty. (*People v. Francis* (1969) 71 Cal.2d 66, 76.)

The *Estrada* rule applies here because the amendments to sections 667 and 1385 allow the trial court the discretion to impose a lesser sentence by striking a prior serious felony enhancement, and the amendments became effective before this case became final on appeal. There is no indication the Legislature intended the amendments to apply prospectively

prior serious felony must be imposed “[i]n compliance with subdivision (b) of Section 1385,” and deleted language in former section 1385, subdivision (b) stating, “This section does not authorize a judge to strike any prior convictions of a serious felony for purposes of enhancement of a sentence under Section 667.” As amended, section 1385 now authorizes the striking of an enhancement under 667, subdivision (a)(1) in furtherance of justice. (§ 1385, subd. (b)(1).)

⁵ The *Estrada* rule is an exception to the general rule that penal statutes are presumed to operate prospectively only unless expressly stated otherwise. (§ 3; see *People v. Brown* (2012) 54 Cal.4th 314, 324 (*Brown*).)

only. (Cf. *People v. Chavez* (2018) 22 Cal.App.5th 663, 712 [amended § 12022.53]; *People v. Woods* (2018) 19 Cal.App.5th 1080, 1090-1091 [same].) The People concede that the *Estrada* rule applies and the amendments apply retroactively.

“Defendants are entitled to sentencing decisions made in the exercise of the “informed discretion” of the sentencing court. [Citation.] A court which is unaware of the scope of its discretionary powers can no more exercise that “informed discretion” than one whose sentence is or may have been based on misinformation regarding a material aspect of a defendant’s record.’ [Citation.] In such circumstances, we have held that the appropriate remedy is to remand for resentencing unless the record ‘clearly indicate[s]’ that the trial court would have reached the same conclusion ‘even if it had been aware that it had such discretion.’” (*People v. Gutierrez* (2014) 58 Cal.4th 1354, 1391; see *People v. McDaniels* (2018) 22 Cal.App.5th 420, 425 [“a remand is required unless the record shows that the sentencing court clearly indicated that it would not in any event have stricken the firearm enhancement”].)

The People contend the record clearly indicates that the trial court would not have stricken either enhancement if it had the discretion to do so at the time of sentencing. We disagree.

In denying Hernandez’s *Romero* motion, the trial court noted that Hernandez had suffered numerous prior convictions since 2003, including most recently several felonies (criminal threat, domestic violence, false imprisonment, and transportation of a controlled substance) and misdemeanors (exhibiting a deadly weapon, two domestic violence convictions, two driving under the influence convictions, and vandalism). The court noted that Hernandez had committed the current carjacking shortly after

being released on parole from his prior imprisonment for making a criminal threat, and stated that in light of his current and prior serious and/or violent felony convictions the court “cannot say that the defendant is outside the letter and the spirit of the Three Strikes law.” The court stated that Hernandez was “dangerous” and was “the type of guy . . . who needs to be taken off the streets,” and sentenced him to the high term of nine years, doubled to 18 years under the Three Strikes law as a result of the denial of the *Romero* motion.

The trial court’s sentencing decisions and comments clearly indicate an intention to impose a lengthy sentence. However, the court declined to impose the maximum sentence of 37 years, and instead struck four one-year prior prison term enhancements and imposed an aggregate term of 33 years. The court could have imposed a term of 28 years in lieu of 33 years by striking the prior strike and imposing the four one-year enhancements, but the court did not have the discretion to impose a term of 29, 30, 31, or 32 years, as it could have done if it had the discretion to strike the five-year prior serious felony enhancement. There is no clear indication in the record that the court would not have imposed a term of 29, 30, 31, or 32 years if it had the discretion to do so at the time of sentencing.

Accordingly, the trial court must be given the opportunity to decide whether to exercise its discretion to strike the five-year prior serious felony enhancement. On remand, the court may reconsider all of its sentencing decisions and impose a new sentence, subject to the limitation that the new sentence cannot exceed the original sentence. (*People v. Lai* (2006) 138 Cal.App.4th 1227, 1245 [directed the trial court to correct a sentencing error, stating, “the court may reconsider the total

sentence, and fashion a new sentence, so long as the new aggregate, nonstayed term does not exceed the original seven-year sentence”]; *People v. Savala* (1983) 147 Cal.App.3d 63, 68-69 [“defendant’s aggregate prison term cannot be viewed as a series of separate independent terms, but rather must be viewed as one prison term made up of interdependent components . . . [¶] [w]hen we ordered the court to set aside the first judgment and to resentence defendant the court was entitled to reconsider all of its sentencing choices, subject only to the limitation that defendant not be sentenced to a greater aggregate term than the first sentence”].)

DISPOSITION

The judgment of conviction is affirmed, the sentence is vacated, and the matter is remanded for resentencing in accordance with the views expressed in this opinion.

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MICON, J.*

We concur:

WILLHITE, Acting P. J.

COLLINS, J.

*Judge of the Los Angeles County Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.